

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-2245; 81-2276; 82-38

TITLE NEVADA, Petitioner v. UNITED STATES, ET AL.,
TRUCKEE-CARSON IRRIGATION DISTRICT,
Petitioner v. UNITED STATES., ET AL.; and
PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner, v. TRUCKEE-CARSON IRRIGATION
DISTRICT, ET AL.

PLACE Washington, D. C.

DATE April 27, 1983

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3 behalf of Nevada.

4 FREDERICK G. GIRARD, ESQ., Sacramento, California; on
5 behalf of Truckee-Carson Irrigation District.

6 ROBERT S. PELCYGER, ESQ., Boulder, Colorado; on behalf
7 of Pyramid Lake Paiute Tribe of Indians.

8 EDWIN S. KNEEDLER, ESQ., Office of the Solicitor
9 General, Department of Justice, Washington, D.C.; on
10 behalf of the United States

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C O N T E N T S

ORAL ARGUMENT OF

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E. BARRETT PRETTYMAN, JR., ESQ.,

on behalf of Nevada

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FREDERICK G. GIRARD, ESQ.,

on behalf of Truckee-Carson

Irrigation District

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ROBERT S. PELCYGER, ESQ.,

on behalf of Pyramid Lake

Paiute Tribe of Indians

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EDWIN S. KNEEDLER, ESQ.,

on behalf of the United States

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E. BARRETT PRETTYMAN, JR., ESQ.,

on behalf of Nevada - rebuttal

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments
next in Nevada against United States, et al.

Mr. Prettyman, I think you may proceed
whenever you are ready.

ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,
ON BEHALF OF NEVADA

MR. PRETTYMAN: Mr. Chief Justice, and may it
please the Court, I represent the state of Nevada, and I
will be followed by Mr. Girard, representing the
Truckee-Carson Irrigation District, or TCID.

This is a preclusion case. The basic issue is
to what extent the United States and the Paiute Tribe of
Indians are barred by res judicata or collateral
estoppel from seeking more water from the Truckee River
in Nevada for the Indians' reservation.

We say that they are completely barred by
virtue of the final decree that was rendered by the
Federal District Court in Nevada in the so-called Orr
Ditch case some 40 years ago. Now, Orr Ditch was no
piecemeal, interlocutory, or open-ended proceeding. As
both of the courts below found, this was a
comprehensive, all-inclusive, quiet title water
adjudication.

It was begun in 1913, with the United States

1 appearing on behalf of both the tribe, which had been
2 set aside -- rather, the reservation, which had been set
3 aside in 1859, and also the Newlands Project, which is a
4 reclamation project authorized by Congress in 1902.

5 Now, Winters had been decided five years
6 before this Orr Ditch case was begun, in 1908, so that
7 for the reservation, the United States was seeking water
8 for the primary purpose of the reservation which it
9 deemed to be to convert the Indians from their nomadic
10 habits into husbandry and agriculture, and therefore to
11 give them water for irrigation.

12 For Newlands, the United States sought enough
13 water to irrigate the project. The case proceeded for
14 some 13 years, until a temporary restraining order was
15 entered in 1926 by the court after a Special Master had
16 heard evidence, and the TRO acted as a kind of a trial
17 balloon. Would the TRO work? Was it feasible?

18 And this test period lasted for 18 years,
19 until finally, in 1944, a final decree was entered which
20 established the quantification for every claimant to
21 this river. It applied then and for the future. It
22 prohibited every claimant from ever again seeking water
23 of the Truckee. It contained no reopening provisions.

24 As for the Indians, the Court of Appeals said
25 the government placed in issue the reservation cause of

1 action.

2 And now what do we find? Twenty-nine years
3 later, the government brought this action seeking
4 additional water on behalf of the tribe. The Ninth
5 Circuit made two holdings. First of all, it held that
6 res judicata prevented this suit insofar as the Orr
7 Ditch defendants were concerned. In other words, even
8 if the United States should not have represented both
9 the reservation and the project, which the Ninth Circuit
10 did not decide, the Orr Ditch defendants were not aware
11 of any impropriety, and consequently res judicata
12 applied.

13 We believe that that ruling is clearly
14 correct.

15 QUESTION: Who were the Orr Ditch defendants?

16 MR. PRETTYMAN: The Orr Ditch defendants were
17 some 744 claimants to the Truckee River, Your Honor.

18 QUESTION: Wholly -- who had pre-existing
19 rights?

20 MR. PRETTYMAN: That's correct, of varying
21 priorities.

22 QUESTION: Wholly aside from those who would
23 get water from the Newlands?

24 MR. PRETTYMAN: I'm sorry.

25 QUESTION: Wholly aside from those who would

1 get water from the Newlands.

2 MR. PRETTYMAN: Yes, these claimants, Your
3 Honor, I think eight of them actually proceeded the
4 reservation claims, and most of them came between then
5 and 1902, and some came after 1902.

6 QUESTION: Yes. All right.

7 MR. PRETTYMAN: Right.

8 The court also made a second ruling, however,
9 and this was two to one, with Judge Schroeder
10 dissenting, namely, that the United States could take
11 water for the tribe from the Newlands Project farmers
12 because in Orr Ditch, the Ninth Circuit thought that
13 there was no adversity under the pleadings insofar as
14 the Newlands farmers were concerned.

15 Now, the first point I would like to make, and
16 incidentally, we obviously regard that ruling as an
17 error. We think res judicata applies across the board.
18 The first point is that there was nothing improper about
19 the government representation in Orr Ditch. In these
20 types of case, as this Court is well aware, the
21 government often has to represent diverse interests. It
22 may be reservations. It may be reclamation projects,
23 national forests, naval bases, and so forth. And this
24 Court said as much last month in Arizona versus
25 California, when it approved Heckman.

1 Heckman, incidentally, had been decided only
2 one year before Orr Ditch began.

3 There was certainly nothing improper perceived
4 at the time of Orr Ditch by the government's
5 representation. It thought that it was proceeding quite
6 properly, and very actively, on behalf of both the
7 project and on behalf of the reservation.

8 Moreover, the government's good faith
9 representation is shown by two factors here. First of
10 all, between the TRO and the final decree, the
11 government actually obtained more water for the Indians
12 than had been prescribed in the TRO. They increased the
13 amount that the Indians were going to get.

14 And secondly, in the Walker River case, Walker
15 River Reservation having been established by the same
16 documents -- the same Indians, as a matter of fact, were
17 involved -- there was no project, no competing project,
18 and the government still did not seek a fishery right in
19 the Walker River case. So, obviously, it was not acting
20 because of any conflict in our case.

21 QUESTION: Mr. Prettyman, just to be sure -- I
22 want to be sure I understand. You say the government
23 actually got more water for the Indians. That is for
24 the reservation rights --

25 MR. PRETTYMAN: Yes, sir.

1 QUESTION: -- not for the fishery rights.

2 MR. PRETTYMAN: That's correct. No discrete
3 fishery right was sought in Orr Ditch.

4 QUESTION: And you challenge the District
5 Court's findings that the tribe's fishery right was not
6 actually litigated in Orr Ditch?

7 MR. PRETTYMAN: Not at all. We concede that a
8 discrete fishery right was not sought as part of the
9 decree in Orr Ditch. Now, the reason I use the word
10 "discrete" is that the United States sought a full
11 Winters right for the reservation, but it was seeking it
12 primarily for irrigation, which it perceived to be the
13 primary purpose of the reservation.

14 So, it also -- domestic water and a small
15 amount of water for fishery undoubtedly was thought
16 about, but you have to understand, Mr. Justice Blackmun,
17 that unlike today, where the government is seeking a
18 tremendous amount of water to maintain the level of the
19 lake, back in Orr Ditch, when they were thinking about a
20 fishery right, they were thinking about a very small
21 amount of water simply to allow the fish to get upstream
22 to spawn.

23 QUESTION: Of course, the lake has gone down
24 70 feet, hasn't it?

25 MR. PRETTYMAN: Well, that is very

1 interesting, Mr. Justice. The lake went down rather
2 dramatically in the forties and fifties, but it has been
3 stabilized since. You will find a finding by the
4 District Court, and the Court of Appeals seems to agree,
5 that the lake has been stabilized, and our studies show
6 that as a matter of fact, it has been stabilized since
7 1960, and on top of that, we have \$32 million spent by
8 the government to add to the fishery, and of course the
9 tribe also gained \$8 million in the -- before the
10 Indians Claim Commission because of their lost right.

11 QUESTION: Which had nothing to do with the
12 lake, however --

13 MR. PRETTYMAN: Well --

14 QUESTION: -- with the fishery rights, except
15 on your broad approach.

16 MR. PRETTYMAN: Well, the Indians Claim
17 Commission decision is a rather interesting one, because
18 the United States and the Indians entered into a kind of
19 a deal where they said, well, since no fishery right
20 could be extinguished, this could not be for the
21 extinguishment of the fishery right. On the other hand,
22 it --

23 QUESTION: Well, it said -- yes, it said it
24 didn't distinguish the water right for a fishery, and it
25 was for what they had lost in the past.

1 MR. PRETTYMAN: That's correct, and it was for
2 a reserved right lost in the past, so the only reserved
3 right that I know that they supposedly lost was for
4 fisheries, so I am not sure that we can say that that
5 was not for a lost fishery right.

6 I would like to address myself briefly to
7 adversity under the pleading. We claim, of course, that
8 you do not need it in an all-inclusive water rights
9 litigation. Every claimant is adverse to every other
10 claimant by virtue of the nature of a quiet title
11 adjudication.

12 However, in this case, we have something in
13 addition. If the Court will address itself to the
14 appendix that we have filed with our reply brief, we
15 summarize the parties in the TRO and in the final
16 decree, and what you will find is that while the United
17 States is listed as a plaintiff, the United States is
18 also listed as a defendant, and under the defendant
19 United States in brackets is listed what, the Newland
20 Project and the reservation.

21 So, the court and the parties which agreed to
22 the stipulated final decree were obviously interested in
23 showing that the rights of the Newlands Project and of
24 the reservation were indeed being adjudicated inter se,
25 and it was putting everybody on notice that that was

1 what was happening, and that is the only purpose of
2 adversity under the pleadings, to give an opportunity to
3 litigate, and to put everyone on notice that rights are
4 being adjudicated inter se.

5 There was not only an opportunity to litigate
6 here, but there was full litigation.

7 QUESTION: Did the tribe here sign it?

8 MR. PRETTYMAN: The tribe sign what?

9 QUESTION: Did the tribe here sign that
10 decreed?

11 MR. PRETTYMAN: You mean the Orr Ditch decree?

12 QUESTION: Yes.

13 MR. PRETTYMAN: No, sir. They were
14 represented by the United States.

15 QUESTION: But they didn't sign it, did they?

16 MR. PRETTYMAN: That is correct. They were
17 fully represented by the United States.

18 I would like to close and save the remainder
19 of my time for rebuttal with just one point. I would
20 like to ask this Court a very simple, practical
21 question. Would hundreds of Orr Ditch defendants have
22 worked for some 31 years in this case, litigated, and
23 then consented to a final decree, would the Newlands
24 Project ever have been built, would the District Court
25 have signed that decree, would western Nevada, as a

1 matter of fact, been built on the basis of that final
2 decree if they had known at the time that there was
3 outstanding some secret, unresolved claim for
4 four-fifths of the water of this river which could be
5 litigated 20 years hence, 40 years hence, 100 years
6 hence, and which could totally destroy the Newlands
7 Project?

8 QUESTION: How much water is the government
9 seeking?

10 MR. PRETTYMAN: The government is seeking,
11 Your Honor, approximately -- between 375,000 and 400,000
12 acre feet of water.

13 QUESTION: A year?

14 MR. PRETTYMAN: Yes. It would be on the
15 average, obviously, Your Honor. But what that would do
16 would be to take at least half the water that is now
17 going to Newlands and divert it, and of course they
18 would have an 1859 priority for the entire 400,000.
19 There are only 500,000 acre feet in the entire river.

20 Thank you, Your Honor.

21 CHIEF JUSTICE BURGER: Mr. Girard.

22 ORAL ARGUMENT OF FREDERICK G. GIRARD, ESQ.,

23 ON BEHALF OF THE TRUCKEE-CARSON

24 IRRIGATION DISTRICT

25 MR. GIRARD: Mr. Chief Justice, and may it

1 please the Court, the government contends in this case
2 that it owns the project water rights. It contends that
3 the Orr Ditch decree permits it to change the manner and
4 place and purpose of use of its water rights to
5 non-project purposes or uses.

6 Basically, the government's contention is that
7 it can allocate as it chooses the Newlands Project water
8 rights to Pyramid Lake or presumably, if that argument
9 is valid, to any federal purpose that it desires,
10 including a possible MX missile site.

11 In our opinion, the government's contention is
12 simplistic and wrong. Orr Ditch in the decree did not
13 decide the ownership of the water rights as between the
14 project owners and the United States. In fact, there is
15 a specific caveat in the decree which states that.

16 This Court has held in Ickes versus Fox in
17 1937 that project water rights identical to these water
18 rights are appropriated for the benefit of the farmers,
19 not the United States, and that the project farmers own
20 the water rights, not the government, and that the
21 government's interest is only as a lienholder to secure
22 the repayment costs of the project.

23 QUESTION: Did the government quantify the
24 Newlands water right they were claiming in terms of what
25 acreage they planned to water?

1 MR. GIRARD: Yes, the degree provides, Justice
2 White, for the allocation of water to 232,000 of acres,
3 or gives the government the right to divert water for
4 232,000 acres.

5 QUESTION: Was that land all under private
6 ownership then, or did the United States own it?

7 MR. GIRARD: Both. Some of it was in private
8 ownership. Some of it was owned by the United States.

9 QUESTION: But water was allocated for all of
10 it, and all of it, I take it, has later become privately
11 owned.

12 MR. GIRARD: That is correct. Purchased from
13 the government. In other words, at the time the action
14 was filed, they were just initiating the construction of
15 the project. The Haunton Dam, which is the principal
16 feature, was not constructed until 1915.

17 QUESTION: Were any contracts entered into for
18 the delivery of water before the final decree?

19 MR. GIRARD: Yes, certainly --

20 QUESTION: Long before.

21 MR. GIRARD: Certainly I would say the
22 majority.

23 QUESTION: When was the Newlands finished?

24 MR. GIRARD: The physical project was finished
25 about in 1919, I would guess, Judge. There may have

1 been --

2 QUESTION: And when was water first delivered
3 to them.

4 MR. GIRARD: Water was first delivered --
5 well, the first delivery of water was 1908. Over the
6 whole project, probably about that period of time.

7 QUESTION: Well, I suppose, then, they were
8 delivered under contract with private owners?

9 MR. GIRARD: Right.

10 QUESTION: Or really, was it with a contract
11 with TCID, or --

12 MR. GIRARD: No, TCID was not in existence
13 until 1926. The government --

14 QUESTION: Yes. Well, who entered into
15 contracts with the private water users?

16 MR. GIRARD: The United States. The United
17 States entered into contracts.

18 QUESTION: And what did TCID have to do with
19 it?

20 MR. GIRARD: TCID became the operator of the
21 project in 1926.

22 QUESTION: For the United States?

23 MR. GIRARD: For the United States, under a
24 contract which --

25 QUESTION: And bound, was it, to observe the

1 contracts the United States had entered into?

2 MR. GIRARD: Yes, and incidentally, TCID
3 itself entered into some contracts with some of the
4 landowners who had purchased their water rights after
5 1926.

6 QUESTION: Right.

7 MR. GIRARD: And TCID itself in the Orr Ditch
8 decree was given the right to divert the water allocated
9 to the United States, and the decree was allocated to
10 TCID to divert in the Truckee River agreement, which was
11 a part of the decree.

12 QUESTION: So was all the water generated by
13 Newlands covered by contract with private owners?

14 MR. GIRARD: There are contract water rights
15 on the Newlands project covering 73,002 acres, not
16 232,000 acres. There is nowhere near enough water to
17 irrigate 232,000 acres.

18 QUESTION: So that is all the water there is
19 available, I take it.

20 MR. GIRARD: That's correct, from both rivers,
21 the Carson and the Truckee.

22 QUESTION: If you divide up the Truckee and
23 the Carson between the -- the Orr Ditch defendants, the
24 Newlands water contractees, and the reservation, you
25 have used all the water. Is that it?

1 MR. GIRARD: That's correct, except for years
2 where you, you know, where you have like a million acres
3 flowing down the river.

4 QUESTION: Yes.

5 MR. GIRARD: Which just goes to Pyramid Lake,
6 but in a normal year, that's correct, Justice White.
7 Now --

8 QUESTION: Mr. Girard, I read Ickes against
9 Fox as turning at least in part on the nature of the
10 Washington system for water rights. Does Nevada have a
11 system substantially similar to Washington's in that
12 case?

13 MR. GIRARD: Nevada has a system appropriation
14 in nature, and you file an appropriation, you acquire a
15 water right by a permit. I would think it is relatively
16 simple. Now, in addition to Ickes versus Fox, these
17 project water rights in this very case on the Newlands
18 Project, the ownership of them have been litigated in a
19 Federal District Court case, U.S. versus Alpine Land and
20 Reservoir Company, which was affirmed on appeal
21 recently, and insofar as the appeal is concerned, the
22 government did not challenge the ownership of the
23 District Court's finding as to the ownership.

24 The District Court in that case specifically
25 held that these Newlands Project water rights were owned

1 by the project farmers, not the United States. On
2 appeal in the briefs the government did not challenge
3 that.

4 Now, our position is very simple.

5 QUESTION: You think then the United States
6 has simply in effect or actually sold water to these
7 private owners.

8 MR. GIRARD: They have sold --

9 QUESTION: They sold water rights to them.

10 MR. GIRARD: Sold them a water right, and it
11 is designated as such in the conveyances.

12 QUESTION: And so they are owned. The -- own
13 it?

14 MR. GIRARD: The water right -- that's
15 correct.

16 QUESTION: And you say the effect of this suit
17 or this judgment is to set aside those conveyances to
18 some extent, anyway?

19 MR. GIRARD: The plain fact of the matter is,
20 this suit has prevailed. They will not get the water
21 that was sold to them. They will get less water by
22 about 50 percent than they purchased.

23 QUESTION: I don't know whether they really
24 purchased it. Who is paying back the cost of the
25 project?

1 MR. GIRARD: In this case the project users.

2 And incidentally --

3 QUESTION: Have they ever paid it off?

4 MR. GIRARD: Ninety-five percent of the
5 purchase of the land and the water rights have been paid
6 off today, since this project. This project was the
7 first reclamation project constructed. Now, there have
8 been additions that have been going on regularly to the
9 project. From the original cost of these lands and
10 water rights, 95 percent of them have been paid off by
11 the project farmers.

12 Again, and these are relatively small project
13 farmers. I think on this district the average farm is
14 60 acres, which is a relatively small farm.

15 Now, I would like to also discuss the United
16 States' statement in light of the Indian Claims
17 Commission, where it contends in its brief or
18 acknowledge that it breached its duty to the tribe. We
19 don't agree. We don't think that the duty was
20 breached. We think the attorneys in Orr Ditch did a
21 capable job under the circumstances, but I would like to
22 at least state that the United States' admission would
23 be commendable if it were willing to assume
24 responsibility for its breach.

25 Its position is that we breached our duty, but

1 someone else should suffer the detriments, the project
2 farmers. In fact, its position is even less
3 altruistic. In the Indian Claims Commission proceeding,
4 and those are in evidence in this case, the ruling of
5 the Indian Claims Commission proceeding, the initial
6 ruling provided that the tribe could recover its damages
7 resulting from the loss of its water rights in Orr Ditch
8 if the tribe could establish that the loss was
9 attributable to the United States' breach of fiduciary
10 duty in representing the Indians in the Orr Ditch case.

11 The case was then set for trial. It was then
12 settled for \$8 million. Then the parties to the
13 settlement, the United States and the tribe,
14 characterized their settlement as not covering the loss
15 of the tribe's fishery right while at the same time
16 agreeing that the \$8 million precluded the tribe from
17 seeking additional compensation from the United States
18 for the loss of that fishery right if the end result of
19 this case establishes that the fishery right is barred.

20 So, bluntly stated, the bottom line in this
21 case is that the tribe received \$8 million, it knowingly
22 -- and that \$8 million was not for the loss of the
23 fishery right in the future -- it knowingly waived its
24 right to go against the United States for compensation
25 for that loss, and in addition, as found by the trial

1 court in this case, in finding of fact 30, the fishery
2 has been restored at Pyramid Lake by the expenditure of
3 some \$32 million for fish hatcheries and things along
4 that line.

5 So, the bottom line, at least in our view in
6 this case, is that everyone has relied on the finality
7 of the Orr Ditch decree. The decree was entered about
8 40 years ago. The temporary restraining order which was
9 entered by the court was entered almost 60 years ago.
10 The decree was a stipulated decree in which TCID itself
11 was a party, signed it, its representatives, along with
12 the United States.

13 The Orr Ditch decree, that decree has probably
14 influenced in a major way the development of Northern
15 Nevada, certainly Churchill County, which is where the
16 Newlands Project is. The parties have relied on it, the
17 Orr Ditch defendants. Subsequent appropriators, people
18 who came in later and acquired up water rights after
19 that decree, have relied on it.

20 That decree has determined whether project
21 water rights are available, and certainly no one more
22 than the Newlands Project farmers have relied on it.
23 They came in --

24 QUESTION: Mr. Girard, why isn't TCID bound by
25 whatever knowledge the U.S. government had in connection

1 with the case? Isn't TCID basically in privy with the
2 United States in legal terms in this case?

3 MR. GIRARD: No, I -- TCID came into the
4 picture, was not in existence until 1926. It came in
5 and operated. I am making these arguments more for the
6 project farmers than TCID. I don't claim that TCID has
7 the water rights.

8 QUESTION: All right.

9 MR. GIRARD: TCID was designated by the trial
10 court as a class representative of the project farmers,
11 and when I make that statement, I really mean it as far
12 as the project farmers, not the entity. They own the
13 water right, not TCID.

14 QUESTION: But you have also some contract
15 obligations to them.

16 MR. GIRARD: Yes, and we fully perform them.
17 In this case, finality was intended by everybody, and
18 the project farmers purchased their water rights, they
19 leveled their land, they built their crops, they relied
20 on the decree, and we feel that this is the type of a
21 case where the decree should be enforced.

22 Thank you, Judge.

23 CHIEF JUSTICE BURGER: Mr. Pelcyger.

24 ORAL ARGUMENT OF ROBERT S. PELCYGER, ESQ.,

25 ON BEHALF OF THE PYRAMID LAKE

1 PAIUTE TRIBE OF INDIANS

2 MR. PELCYGER: Mr. Chief Justice, and may it
3 please the Court, the Pyramid Lake Reservation was
4 established in 1859 for the Pyramid Lake Paiute Tribe of
5 Indians, whose name for themselves is Cui-ui Dicato,
6 cui-ui eaters. Contemporaneous documents show that the
7 government's intent was to include Pyramid Lake and its
8 "large fisheries" in the reservation, and that such a
9 reservation would have the advantage of being the
10 Paiute's home from choice.

11 Both lower courts expressly found that one of
12 the reservation's purposes was to provide Indians with
13 access to their historic fisheries.

14 QUESTION: That was their historic -- that was
15 their ancestral country?

16 MR. PELCYGER: Yes, sir, it was their historic
17 home. It was -- It had the advantage of being their
18 home from choice. They were the Cui-ui Decato, where
19 the cui-ui are found no place else in the world except
20 at Pyramid Lake.

21 Water from the Truckee River was and continues
22 to be necessary to fulfill this purpose in two respects,
23 to maintain the level of the lake and for sufficient
24 water in the river to sustain natural reproduction of
25 the fish.

1 QUESTION: Counsel, I am curious about one
2 thing which is totally irrelevant. Is the lake
3 freshwater?

4 MR. PELCYGER: The lake -- the salinity level
5 of the lake is 5,500 parts per million, which compares
6 to the ocean, for example, of 35,000 parts per million
7 of total dissolved solids, so it is about one-seventh as
8 -- less salty than the ocean, but compared to the river,
9 the river is only, say, 250 parts per million or 500
10 parts per million, so it is much saltier than the ocean,
11 and the fish --

12 QUESTION: There is no outlet to the lake at
13 all?

14 MR. PELCYGER: There is no outlet, but the
15 fish need the fresh water to spawn in. They live most
16 of their lives in the lake, but they ascend the river to
17 spawn.

18 QUESTION: Can they get up now?

19 MR. PELCYGER: They can get up now. Congress
20 authorized and the Interior Department built a fishway
21 in 1976.

22 QUESTION: And are they using it?

23 MR. PELCYGER: Yes, they are, and last year
24 there were 15,000 fish that ascended that fishway to
25 spawn.

1 QUESTION: And returned?

2 MR. PELCYGER: And returned. Yes, sir.

3 QUESTION: Are the cutthroat trout gone
4 completely, or have they been --

5 MR. PELCYGER: No, there is an interesting
6 biological question that biologists like to debate
7 about. Spawn from the -- The Lahontan cutthroat trout,
8 first let me say, are being restocked in the lake
9 through hatcheries. There is no real natural
10 reproduction of trout because they can't get above Derby
11 Dam to spawn. The cui-ui are naturally reproducing.
12 The trout are not. But the trout through two tribal
13 hatcheries, a federal hatchery, are being -- are being
14 stocked in the lake, and there is a decent sportsmen's
15 fishery there which brings in most of the money that the
16 tribe exists on.

17 There's an obscure biologists' question that
18 they like to debate about whether the original -- the
19 trout were destroyed in 1940. They ceased to exist in
20 the lake. But --

21 QUESTION: Because they couldn't get above the
22 Derby Dam?

23 MR. PELCYGER: No, because they couldn't get
24 out of the lake --

25 QUESTION: I see. Oh, yes, that's right.

1 MR. PELCYGER: The obscure question is whether
2 the eggs that were taken from the Pyramid Lake, Lahontan
3 cutthroat trout, and were deposited all over the western
4 United States prior to 1940, whether that gene pool
5 still exists in these other places and are now being
6 restored to the lake by getting eggs from those fish.

7 And in fact there was an article in Sports
8 Illustrated about three or four years ago where a
9 biologist claimed that the original trout was relocated
10 in a small stream in Utah. But in any event, the
11 species itself exists and exists in Pyramid Lake today.

12 Let me say also there was nothing whatsoever
13 in the record in this case to suggest that the
14 government did not assert a water right for fishery
15 purposes in the Orr Ditch case because the fishery was
16 not deemed to be a primary purpose of the reservation.

17 The federal court in the sturgeon case in
18 1879, which was a trespass case brought by the United
19 States to prosecute non-Indian fishermen at Pyramid Lake
20 specifically held that the principal purpose of the lake
21 was the fishery, and without the fishery there was
22 nothing.

23 And Congress in 1956, when it enacted
24 legislation to restore the Pyramid Lake fishery,
25 specifically said the fishery at Pyramid Lake was once

1 world famous. The trout there got to be 41 pounds at
2 one point. The world record for the species was caught
3 at Pyramid Lake. And that restoration of the Pyramid
4 Lake fishery is deemed, to its full potential value, is
5 deemed to be of national interest and importance.

6 Now, of course, the trout is --

7 QUESTION: What fish were the Indians selling
8 to the Army, or to the white settlers?

9 MR. PELCYGER: The trout. The white people
10 never developed a taste for cui-ui.

11 QUESTION: All right.

12 MR. PELCYGER: The trout is now an endangered
13 species -- I'm sorry, the trout is now a threatened
14 species. The cui-ui is endangered. The cui-ui, in
15 fact, is the only remaining pure species left in its
16 genus, and so the species is in jeopardy of extinction,
17 but the cui-ui --

18 QUESTION: Well, is that information any more
19 reliable than information we got that the snake doddle
20 was about to go?

21 MR. PELCYGER: I can't speak to that, Justice
22 Marshall. I don't know about that information.

23 The Orr Ditch litigation was a travesty. The
24 judge who entered the decree was formerly a lawyer for
25 the defendants in the case who argued against the

1 existence of a water right for the fishery. The lawyer
2 who was representing the government and through the
3 government the Indians when the final decree was entered
4 had formerly been the lawyer for the Truckee-Carson
5 Irrigation District and for a group of water users on
6 the project. The United States --

7 QUESTION: Do you have any response to the
8 assertion by Nevada that there was formal adversity in
9 the 1926 TRO and in the final decree, as they pointed
10 out in the reply brief?

11 MR. PELCYGER: Yes, Your Honor. There
12 couldn't be any formal adversity because both the
13 Newlands Project and the United States were represented
14 by the same party, the United States. The United States
15 couldn't be adverse to itself. The same attorneys were
16 representing the Indians' interests and the interests of
17 the Newlands Project. Adversity is incomprehensible in
18 those circumstances.

19 What Nevada pointed out in its reply brief is
20 that the caption of the case was in the nature of an
21 index, and the caption of the case told you where to go
22 to find out the rights of the Newlands Project, the
23 rights of the Indians, but it didn't and it couldn't
24 have conceivably adjudicated those rights. In fact, it
25 wouldn't even have been a justiciable issue, because the

1 United States couldn't litigate against itself.

2 QUESTION: Nevada also argues that you don't
3 need adversity, as Judge Schroeder felt in her dissent,
4 in a water litigation, that everyone in the case is
5 bound, whether or not they were adverse to one another.

6 MR. PELCYGER: But you need justiciability.
7 You certainly need justiciability. And how --

8 QUESTION: Is justiciability a requirement of
9 -- kind of a federal requirement in water rights?

10 MR. PELCYGER: Well, justiciability is a
11 constitutional requirement.

12 QUESTION: It's an -- yes.

13 MR. PELCYGER: And the issue here, the reason
14 that justiciability is important relates to the identity
15 of claims issue of res judicata, because there is no
16 question that the fishery water right was not actually
17 litigated in Orr Ditch. The only question that this
18 Court has to face on --

19 QUESTION: Why do you say a fishery water
20 right? I mean, the Indians' claim of water right under
21 the Winters doctrine was litigated, but the fact that
22 the government might have left out one argument for
23 getting more water doesn't mean the specific right
24 wasn't --

25 MR. PELCYGER: It's not just an argument.

1 There was no evidence whatsoever that the fishery needed
2 water. There was no --

3 QUESTION: Okay, so the government forgot to
4 put in some evidence.

5 MR. PELCYGER: Well, I don't think it's that.
6 The government made a conscious, deliberate decision,
7 and the record shows, and the District Court found that
8 it made that decision because the fishery right
9 conflicted with the right for the Newlands Project.
10 There wasn't enough water for both purposes.

11 QUESTION: There you are. There you are.
12 Now, what about adversity at the time of the final
13 decree? Who had an interest in the Newlands water right
14 at the time of the final decree?

15 MR. PELCYGER: Who had an interest in the
16 Newlands water right?

17 QUESTION: Yes.

18 MR. PELCYGER: The United States and the
19 project farmers, and TCID.

20 QUESTION: The project farmers did, and you
21 wouldn't -- would you say that they were adverse to the
22 -- any more water for the Indians?

23 MR. PELCYGER: Were they adverse to it? Did
24 they oppose it?

25 QUESTION: Did they have adverse interests in

1 the water right?

2 MR. PELCYGER: There is no question but that
3 there was a conflict. There was competition between
4 those two interests. But there was no adversity in the
5 legal sense within the confines of the Orr Ditch case
6 because the --

7 QUESTION: Well, by the time of the final
8 decree, it wasn't just the United States that was asking
9 for a water right, or whose water right was being
10 adjudged. You aren't really suggesting what the United
11 States argued, that they could take -- they could today
12 take this Newlands water right and give it to a national
13 forest?

14 MR. PELCYGER: I am not suggesting that. I am
15 not sure that the -- I don't think the United States is
16 suggesting that.

17 QUESTION: Or that they could reallocate any
18 way they wanted to the Newlands water right just because
19 it was adjudicated to them in 1943 or --

20 MR. PELCYGER: No, I think the point of the
21 United States is that -- and I will let them speak for
22 themselves -- that --

23 QUESTION: Yes, well, I have read their brief.

24 MR. PELCYGER: Okay. Is that the right of the
25 projects is derivative through -- the project users is

1 derivative by contract, and if that contract is
2 breached, their remedy is for breach of contract, but
3 that there is nothing in the decree that -- this is a
4 res judicata case -- that there is nothing in the decree
5 that prevents the government from doing what it does.

6 I would like for a second, if I could, to get
7 back to Justice Rehnquist's question about
8 justiciability. This Court must find, to uphold res
9 judicata, that the fishery water right should and could
10 have been litigated in the Orr Ditch case. There is no
11 way that that finding can be made if the issue would not
12 even have been justiciable.

13 QUESTION: Well, you insist that the fishery
14 water right is some sort of a separate kind of right
15 from the Indian claim under the Winters doctrine
16 generally. I view it just as insufficient evidence as
17 to one possible use that the Indians --

18 MR. PELCYGER: It was clearly distinguished by
19 the government. The government sought an irrigation
20 right for the tribe, and it sought that right precisely
21 because there was a determination by the government that
22 there wouldn't be a conflict between the irrigation
23 right and the fishery right, and that's why it didn't
24 assert the fishery right.

25 So, whether -- I don't think this case

1 presents whether in some other circumstance a Winters
2 doctrine right for fishery and irrigation is part of the
3 same right or is different. The crucial factor here is
4 that the water right for the Newlands Project was
5 consistent with the Indians' irrigation right because it
6 was so small, but was inconsistent and deemed to be
7 inconsistent and in conflict with the fishery water
8 right. That's why the fishery water right was not
9 asserted.

10 QUESTION: But aren't all water rights
11 appurtenant to land? I mean, it is just an amount of
12 water that attaches to certain land. That's all.

13 MR. PELCYGER: Yes, but the land is
14 different. The irrigable land on the Indian reservation
15 is 6,000 acres of irrigable land to which the irrigation
16 water right is appurtenant. The fishery water right is
17 appurtenant to Pyramid Lake and to the Truckee River,
18 which is within the reservation. There's different land
19 involved. It's as if there were two different parcels
20 of land involved in a quiet title action.

21 Now, the conflict of interest, which is the
22 critical point from the tribes' standpoint in this case,
23 and which was expressly found to exist, the District
24 Court found not only that the conflict exists, but that
25 the conflict was the reason that the fishery water right

1 was not asserted.

2 QUESTION: Now, that's what I wanted -- you
3 mentioned that earlier. Where is that finding? What
4 finding is that?

5 MR. PELCYGER: That finding is -- Let me quote
6 it to you. On Page 185-A of the Petitioner's appendix.

7 QUESTION: Finding 9? Is that the one?

8 MR. PELCYGER: Excuse me?

9 QUESTION: Finding 9? Is that the one?

10 MR. PELCYGER: Yes. It was the intention of
11 the plaintiff, that is, the United States, by and
12 through its attorneys, the Bureau of Indian Affairs, and
13 the Bureau of Reclamation, to assert as large a water
14 right as possible for the Indian reservation and to do
15 everything possible to protect the fish for the benefit
16 of the Indians and the white populations "insofar as it
17 was consistent with the larger interests involved in the
18 proposition having to do with the reclamation of
19 thousands of acres of arid and now useless land for the
20 benefit of the country as a whole."

21 So, this finding is a smoking gun. It shows
22 not only the existence of the conflict, but it shows
23 that it adversely affected the performance of the
24 government's lawyers, and the tribe's primary submission
25 is that because of this government's conflict, the tribe

1 was denied a full and fair opportunity to be heard.

2 QUESTION: The finding doesn't quite say that
3 they would have asked for more water if they weren't
4 acting in both capacities, though. Or do you think that
5 is the correct reading of it?

6 MR. PELCYGER: Well, I think you can safely
7 say by analogy to the criminal cases, to Cuyler against
8 Sullivan and Wood against Georgia, that it certainly
9 shows that the conflict influenced the conduct of the
10 litigation and adversely affected it from the tribe's
11 standpoint.

12 Now, I think it is impossible for any court to
13 make a finding about what would have happened if this
14 wasn't there, but the finding says that there was actual
15 prejudice, and I don't see for due process purposes how
16 you could have anything more than that.

17 QUESTION: Well, is there any evidence other
18 than -- taken apart from the finding, what is the
19 evidence that the government would have sought more
20 water on behalf of the Indians had they not represented
21 the other group?

22 MR. PELCYGER: Because every time the issue
23 was brought up, and there were specific recommendations
24 made to assert the water right, the reason that it was
25 not asserted had nothing to do with it wasn't

1 meritorious, it wasn't a primary purpose of the
2 reservation. The reason it was not asserted was because
3 of the conflict with the Newlands Project.

4 There is a letter in the record in the joint
5 appendix, at Page 444, for example, where the Secretary
6 of the Interior says, inasmuch as there is at nearly all
7 times only enough water for irrigation purposes, it is
8 believed that it would be most difficult, if not
9 impossible, to obtain a portion for fish life.

10 And the government attorneys, the Justice
11 Department attorneys specifically said the same thing.
12 They said, a Congressman wrote to the Attorney General
13 and said, what are you doing about fish life in the
14 Truckee River? And the Justice Department Attorney
15 answered by saying that the fishery issue was completely
16 outside the scope of the Orr Ditch case. It was never
17 in the case.

18 And then he went on to say, "Inasmuch as the"
19 -- and this supports the justiciability argument,
20 Justice Rehnquist, "Inasmuch as the government has
21 control of the Derby Dam, I have always thought that the
22 Reclamation Service and the Indian Service, both bureaus
23 of the Department of the Interior, could settle the
24 matter between them as to providing the proper fishways
25 and comparatively small amount of water which may be

1 needed to enable the fish to pass up the fishways."

2 So, the Justice Department knew that it wasn't
3 an issue that could and should have been litigated. The
4 Justice Department knew that it had to be settled
5 administratively and couldn't be litigated in a case in
6 which the Justice Department was representing both of
7 those bureaus through the Secretary of the Interior.

8 Thank you. My time is up.

9 CHIEF JUSTICE BURGER: Mr. Kneedler, you may
10 proceed when you are ready.

11 ORAL ARGUMENT OF EDWIN S. KNEEDLER, ESQ.,
12 ON BEHALF OF THE UNITED STATES

13 MR. KNEEDLER: Thank you, Mr. Chief Justice,
14 and may it please the Court, I would like to make
15 something clear at the outset of my argument. The
16 government is not asserting that it owns the water
17 rights in this case and that it has a right to
18 reallocate that water willy-nilly to any use it might
19 desire, to a wildlife refuge, to the MX missile. We are
20 not asserting any such right.

21 The narrow question involved at this
22 interlocutory stage of the case is whether the United
23 States and the tribe are absolutely barred by the
24 doctrine of res judicata, from seeking to establish a
25 prior reserved water right for the fishery on their

1 reservation. This case does not concern what rights the
2 individual Newlands Project landowners might have under
3 the contracts that they entered into with the United
4 States.

5 QUESTION: Suppose, Mr. Kneedler, they had
6 been absolute parties, named parties by the -- in the
7 case by the time of the final decree by virtue of their
8 -- by virtue of their contracts with the United States.

9 MR. KNEEDLER: I think that might well have
10 made a difference, Mr. Justice White.

11 QUESTION: Might well, or would?

12 MR. KNEEDLER: Well, it is certainly a
13 distinguishing factor. I think on the question of res
14 judicata it might well be dispositive.

15 QUESTION: I would think it would, but you
16 think this case is different just because the United
17 States was sitting there with a bunch of contracts with
18 landowners, and they got a final decree in the United
19 States' favor for the Newlands Project, knowing all the
20 time that they had contracted away all of that water
21 that was available, and that -- don't you think that the
22 United States at least ought to be subject to specific
23 performance of their contracts rather than -- rather
24 than take the water away and let the -- and have to pay
25 for it?

1 MR. KNEEDLER: There are several responses.
2 First, the United States is ordinarily not subject to
3 specific performance for its contracts. What those
4 contracts would have -- Let me go back. The issue in
5 this case essentially at this point, where the tribe now
6 is a party, and the Newlands Project water users now are
7 parties, is whether the claims asserted on behalf of
8 each of them are barred by the doctrine of res judicata.

9 Neither the tribe nor the individual water
10 users was a party to the prior decree. But beyond that,
11 the water rights that each asserts now was not
12 adjudicated in the prior decree. We have the District
13 Court's finding that the fishery right which the tribe
14 and the United States on its behalf were asserting was
15 not involved.

16 But getting to Mr. Justice White's point, the
17 rights of the individual project water users were not
18 adjudicated in Orr Ditch. Counsel for TCID concedes
19 that --

20 QUESTION: Well, the amount of water was
21 adjudicated to Newlands.

22 MR. KNEEDLER: To the United States, and --

23 QUESTION: Yes. Yes.

24 MR. KNEEDLER: -- but the decree -- the decree
25 went --

1 QUESTION: And the United States had already
2 contracted it all away.

3 MR. KNEEDLER: But the decree itself went no
4 further. The decree did not adjudicate the rights that
5 were conveyed by the contracts. The decree went only so
6 far as awarding a diversion right to the United States.

7 QUESTION: But Ickes against Fox surely says
8 that the government doesn't get beneficial title to the
9 water that's adjudicated in that way.

10 MR. KNEEDLER: Yes, but the right that the
11 project water users are asserting is not a right that
12 was adjudicated, was recognized by the decree in Orr
13 Ditch. It was separately conveyed by the United States
14 when it entered into the contracts with the individual
15 water users.

16 QUESTION: Then that had already been done.

17 MR. KNEEDLER: The contracts were entered into
18 over a period of time, by the time of the final decree.

19 QUESTION: Well, it had all been done by the
20 time of the final decree.

21 MR. KNEEDLER: Virtually all. I don't know
22 for certain, but virtually all.

23 QUESTION: Well, don't you think the United
24 States was just, in a way, not only a representative of
25 the tribe, but a representative of the landowners in the

1 final decree? They had already contracted all their
2 rights away.

3 MR. KNEEDLER: Well, in terms of the text of
4 the final decree, in fact, the answer is no. The text
5 of the decree --

6 QUESTION: But what about for the purposes of
7 res judicata?

8 MR. KNEEDLER: Well, for -- I think that's
9 quite important for the purposes of res judicata,
10 because what we are talking about under res judicata is
11 looking at the confines of the decree and what effect
12 should be given to the decree. The decree states, and
13 in fact the District Court in this very case found that
14 the United States appeared in a representative capacity
15 on behalf of the Indians, but it did not say that the
16 United States appeared in a representative fiduciary
17 capacity on behalf of the individual project water
18 users.

19 It said, in fact, that the United States --
20 the District Court in this case specifically found the
21 United States sued in its own capacity, and the water
22 right that was adjudicated to it was made under the Orr
23 Ditch decree, now, specifically, and I quote, "under
24 such control, disposal, and regulation as the plaintiff
25 may make or desire," the plaintiff being the United

1 States.

2 QUESTION: Mr. Kneedler, is it conceded that
3 many of these landowners actually paid the United States
4 for the water rights they now enjoy?

5 MR. KNEEDLER: Yes.

6 QUESTION: And if the government, the United
7 States should ultimately prevail in this case, would it
8 be the obligation of the United States government to
9 condemn those rights and pay compensation.

10 MR. KNEEDLER: I -- at this point, Justice
11 Powell, I am not at liberty to concede that the United
12 States would be liable for damages.

13 QUESTION: Isn't it --

14 MR. KNEEDLER: Certainly there would be a
15 cause of action for either breach of contract or for
16 taking. There would be a remedy in the Court of
17 Claims. The question would be whether the contracts
18 that conveyed these water rights in fact were breached
19 in a sense that the United States should be liable for.

20 QUESTION: Isn't it your position that the
21 United States as a fiduciary defaulted in its duty?

22 MR. KNEEDLER: As a fiduciary to the tribe.

23 QUESTION: Yes.

24 MR. KNEEDLER: Yes, it is quite firmly our --

25 QUESTION: And the United States now wants to

1 default in its duty to the landowners?

2 MR. KNEEDLER: Justice Powell, I don't suggest
3 that the current circumstances are easy ones. The
4 United States has not lightly undertaken this lawsuit.
5 And the United States filed an original action in this
6 Court because it perceived the substantial breach. So I
7 do not want to suggest that this is something that the
8 United States has undertaken lightly.

9 QUESTION: Mr. Kneedler, after the \$8 million
10 settlement, may the United States still be sued, as you
11 suggest? Didn't that settlement foreclose any further
12 action?

13 MR. KNEEDLER: It forecloses the tribe. I
14 understood Justice Powell to be asking whether the
15 individual project, Newlands Project water users --

16 QUESTION: The case is very, very worrisome,
17 because any way it is decided, someone will lose.
18 Someone will lose seriously. Someone always loses a
19 lawsuit, but this case is very perplexing because of
20 the --

21 MR. KNEEDLER: But when we look to the
22 circumstances of the case, Justice Powell, what we have
23 is a fishery water right that -- a use to which the
24 water of the Truckee was put from time immemorial by the
25 Indians involved in this suit, a use to which it was

1 being put at the time this very case was brought, and
2 the District Court's findings in this case concur with
3 what Mr. Pelcyger said.

4 The District Court's findings establish in our
5 view, unfortunately, that the executive officials within
6 the Interior Department resolved the conflict of
7 purposes with which they were confronted against the
8 reservation and in favor of the Newlands Project, and in
9 addition to the particular finding that Mr. Pelcyger
10 relied on, I would also like to refer the Court to Page
11 165-A of Nevada's appendix to Nevada's petition, where
12 the Court says, "The United States was squarely
13 presented" with a conflict of purposes that was
14 "apparent and foreseeable," deriving from the need to
15 satisfy water rights for the reservation and for the
16 project out of a limited quantity of water. This case
17 is thus the opposite end of the spectrum from what the
18 Court had in Arizona versus California.

19 QUESTION: Do you think that conflict of
20 interest, however, wouldn't prevent res judicata from
21 attaching if the Newlands landowners had been parties at
22 the time of the final decree?

23 MR. KNEEDLER: Well, I think that would be a
24 different case, because the --

25 QUESTION: I thought you said a while ago it

1 would be dispositive of the res judicata question.

2 MR. KNEEDLER: I said it might well be
3 dispositive. I think there might be a question as to
4 whether the TCID or the project water users actively
5 participated other than being a nominal party.

6 QUESTION: Do you defend the opinion of the
7 Court of Appeals?

8 MR. KNEEDLER: Yes, the position of the United
9 States is that there is no need to disturb the water
10 rights of the defendants who were sued in Orr Ditch.

11 QUESTION: That is the judgment. How about
12 the opinion?

13 MR. KNEEDLER: Yes. Well, we think there are
14 several factors going to the --

15 QUESTION: You are relying on the ground here,
16 at least one of your grounds, that the Court of Appeals
17 did not use, I take it.

18 MR. KNEEDLER: No. What the Court of Appeals
19 said is that the judgment in Orr Ditch should not be
20 read to have conclusively decided all causes of action
21 between the tribe and TCID, because of the lack of
22 setting up those claims in an adverse sense.

23 What I have explained here is why the terms of
24 the Orr Ditch decree in fact established that, that they
25 did not adjudicate either the individual water rights

1 that are being asserted in this case or the tribe's
2 water rights that are asserted in this case. We submit
3 that when the two persons interested were not even
4 parties, and the rights they are now asserting in the
5 case were not even litigated in that case, that res
6 judicata does not apply, and that was basically the
7 reasoning of the Court of Appeals. What the Court of
8 Appeals did was rely --

9 QUESTION: One of your arguments, I take it,
10 wholly independent of res judicata, is that the water
11 was adjudicated to the United States, and that as long
12 as you -- and that you can take the water away from one
13 of your contractees and give it to somebody else just as
14 long as you are willing to pay the contractees.

15 MR. KNEEDLER: No, Justice White, that is
16 not --

17 QUESTION: I thought that was the message of
18 your brief.

19 MR. KNEEDLER: Well, there --

20 QUESTION: You say you can --

21 QUESTION: I did, too.

22 MR. KNEEDLER: That may be --

23 QUESTION: You can reallocate your water any
24 way you want to as long as you are willing to pay
25 whoever you hurt.

1 MR. KNEEDLER: Well, that may be --

2 QUESTION: And who knows that 40 years from
3 now you won't be coming back to rewrite history again.

4 MR. KNEEDLER: Well, we are not -- as I said,
5 we are not asserting the right to do this on the basis
6 of a right to reallocate. All we are -- What -- The
7 argument --

8 QUESTION: You certainly -- I must have
9 misread your brief, Mr. Kneedler.

10 MR. KNEEDLER: Well, what -- our --

11 QUESTION: Which is certainly possible.

12 MR. KNEEDLER: Well, and perhaps I didn't
13 express myself very well there. Let me try again. All
14 we are saying is that the decree went no further than to
15 adjudicate the rights of the United States, a right of
16 diversion in the United States --

17 QUESTION: Then you went on and said, we may
18 reallocate our water right, and if the landowners have
19 any beef, they can come and try to get paid. That's
20 what you said in your brief.

21 MR. KNEEDLER: But the reallocation point,
22 though, we relied upon to reinforce the conclusion that
23 the decree didn't go further, that the private
24 defendants in the lawsuit are permitted to reallocate
25 their water. The decree did not forever prohibit them

1 from diverting the water to another use.

2 QUESTION: I thought what I suggested was your
3 opening argument.

4 MR. KNEEDLER: Well, we -- it may well be that
5 the United States could go further and without any --
6 and do --

7 QUESTION: As you did. As you did.

8 MR. KNEEDLER: Well --

9 QUESTION: Well, you may be right. Who knows?

10 MR. KNEEDLER: We may be, but it is not
11 necessary to go that far in this case, because all this
12 case involves is the question of res judicata, which
13 depends on the decree.

14 I would like to address briefly whether we
15 defend the opinion of the court below, and we do. The
16 court drew on the principle now set forth in Section 38
17 of the restatement of judgments relying on adversity
18 under the pleadings. Whatever one's view of whether
19 that rule is sensible or not sensible, and the fact that
20 the restatement has reinvoked it suggests that it is of
21 continuing vitality, but the important point for this
22 case is that the question of res judicata goes to the
23 effect of the Orr Ditch decree.

24 What we have in the Orr Ditch decree is a
25 specific focusing on -- or in the Orr Ditch litigation,

1 a specific focusing on the problem of a need for
2 adversity under the pleadings. The District Court in
3 Orr Ditch itself took measures to assure adversity among
4 the defendants, but did not do that among the interests
5 represented by the plaintiffs.

6 QUESTION: Mr. Kneedler, is there a federal
7 rule of res judicata that should apply in this case, or
8 does it depend on the law of the state of Nevada?

9 MR. KNEEDLER: We would submit that there
10 would be a federal rule of res judicata because the
11 rights being asserted here were federal rights.

12 QUESTION: How about Allen against McCurry?
13 There were federal rights being asserted there, too.
14 That was a 1983 case.

15 MR. KNEEDLER: Well, this is a suit brought in
16 federal court, though, so --

17 QUESTION: Well, so was that. I mean, do you
18 know of a case that says there should be a federal rule
19 of res judicata under these circumstances?

20 MR. KNEEDLER: Offhand I do not, but I would
21 think ordinarily that the -- there might be a separate
22 question of whether federal law would adopt state law,
23 but ordinarily I would think in a federal suit brought
24 by the United States to declare federal water rights
25 that there would be a federal rule of res judicata.

1 The point I wanted to make is that the
2 District Court in this very case as distinguished from
3 assuring diversity on the pleadings among the defendants
4 did not do that for the respective rights being asserted
5 in this case to assure some way in which those rights
6 would be met in a square conflict.

7 Now, I wanted to lastly address one point that
8 Justice O'Connor asked about, whether TCID and the
9 project water users that they represent should be
10 charged with the actions or knowledge of the United
11 States. I think there is considerable force to that
12 point that when parties take through another party to a
13 lawsuit, to some extent they must be charged with the
14 acts of that party, but there is more here.

15 Here we have TCID on behalf of the project
16 water users affirmatively opposing the assertion of
17 water rights by the United States, seeking to expand the
18 water right for irrigation purposes, even, putting to
19 one side the fishery right which TCID opposed even
20 releasing water for two weeks in 1925 or 1926, I think
21 it was, for the fishery.

22 Here we have TCID vigorously opposing the
23 assertion of rights by the United States. Therefore, it
24 is not just the circumstances, but it was brought
25 vividly to TCID's attention that the United States had

1 conflicting obligations to the Indian interests and to
2 the reclamation project interests.

3 Thank you.

4 CHIEF JUSTICE BURGER: Do you have anything
5 further, Mr. Prettyman?

6 ORAL ARGUMENT OF E. BARRETT PRETTYMAN, JR., ESQ.,

7 ON BEHALF OF NEVADA - REBUTTAL

8 MR. PRETTYMAN: Just a few points, Mr. Chief
9 Justice.

10 Mr. Pelcyger said that the United States
11 couldn't be adverse to itself. The United States was
12 adverse to itself, named as party, both plaintiff and
13 defendant, and is in this very case -- it is seeking
14 runoff water for the Stillwater refuge in this case, and
15 Stillwater is located half in and half out of the
16 Newlands Project. If they win in this case, there isn't
17 going to be any runoff water for the very interests that
18 they are seeking it for in this case.

19 I would simply say in regard to Mr. Kneedler's
20 main point, if he can take this water and do with it as
21 he pleases, one wonders why the District Court
22 quantified the Newlands right down to the last acre
23 foot, not only in terms of the total amount of acre feet
24 that we've got, but 3.5 and 4.5 acre feet per acre for
25 Newlands specifically.

1 QUESTION: Could you take water -- Where is
2 the dam that --

3 MR. PRETTYMAN: Derby Dam, Your Honor, is --
4 after it leaves what we call the Meadows --

5 QUESTION: Yes.

6 MR. PRETTYMAN: -- which is where most of the
7 farmers are located other than Newlands, it goes down
8 the river. It then splits at Derby Dam, and half of it
9 goes off to the left, to Pyramid, and the other half
10 goes off down to Newlands. Stillwater is on the far
11 side of the Newlands Project.

12 QUESTION: But the dam is above the split.

13 MR. PRETTYMAN: The dam is at the split.

14 QUESTION: Is at the split?

15 MR. PRETTYMAN: Yes, sir.

16 QUESTION: But you could water -- you could
17 bring water to the reservation from behind the dam?

18 MR. PRETTYMAN: Yes, you --

19 QUESTION: And that water that is stored is
20 available to the -- physically available.

21 MR. PRETTYMAN: Yes. As a matter of fact,
22 that is one of the interesting things I wanted to point
23 out when they talked about an alleged conflict before.
24 When it was originally contemplated in the 1904 Act,
25 when they talked about -- remember, there was some talk

1 about the larger purposes of reclamation? What was
2 contemplated at that time under the 1904 Act was that
3 the reservation was going to be irrigated out of
4 Newlands.

5 They thought that there was going to be a
6 canal built from Newlands so that the reservation was
7 going to get -- was going to be irrigated. That's what
8 they meant by the larger interest of reclamation. They
9 were including Newlands in that. They weren't just
10 talking about Newlands. They were talking about the
11 reservation.

12 Unless there are questions, Your Honor, I have
13 nothing further.

14 CHIEF JUSTICE BURGER: Thank you, gentlemen.
15 The case is submitted.

16 (Whereupon, at 2:37 o'clock p.m., the case in
17 the above-entitled matter was submitted.)
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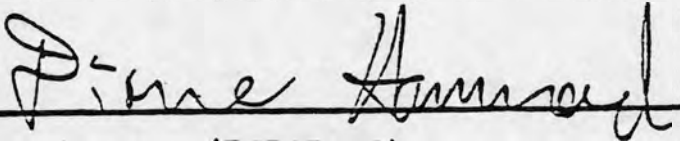
CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

- #81-2245 - NEVADA, Petitioner, v. UNITED STATES, ET AL.,
- #81-2276 TRUCKEE-CARSON IRRIGATION DISTRICT, Petitioner, v.
 - UNITED STATES, ET AL., and
- #82-38 - PYRAMID LAKE PAIUTE TRIBE OF INDIANS, Petitioner,
 - v. TRUCKEE -CARSON IRRIGATION DISTRICT, ET AL.,

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY

A handwritten signature in cursive script, appearing to read "Pine Hunsaker", written over a horizontal line.

(REPORTER)

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